No. 74-1270

In the Supreme Court of the United States

OCTOBER TERM, 1974

RUSSELL TRAIN, ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY, ET AL., PETITIONERS

v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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v.

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

The Solicitor General, on behalf of the Environmental Protection Agency and its Administrator,[1] petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. B) is reported at 507 F. 2d 743. The opinion of the district court (App. C) is reported at 373 F. Supp. 991.

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[1] The Nuclear Regulatory Commission and the Energy Research and Development Administration concur in the views expressed herein.

JURISDICTION

The judgment of the court of appeals was entered December 9, 1974 (App. A). On March 4, 1975, Mr. Justice White extended the time within which to petition for a writ of certiorari to and including April 8, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

REGULATIONS AND STATUTES INVOLVED

Sections 125.1(y) and 125.2(a)(1) of Title 40, Code of Federal Regulations, read in part as follows:

§ 125.1 *Definitions.*

* * * *

(y) The term "pollutant" means * * * radioactive materials * * * discharged into water. * * *

COMMENT.—The legislative history of the [Federal Water Pollution Control] Act [Amendments of 1972] reflects that the term "radioactive materials" as included within the definition of "pollutant" in section 502 of the Act [33 U.S.C. (Supp. III) 1362] covers only radioactive materials which are not encompassed in the definition of source, byproduct, or special nuclear materials as defined by [Section 11e, s, t (redesignated z, aa) of] the Atomic Energy Act of 1954, as amended [42 U.S.C. 2014(e), (z), (aa)], and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term "pollutant" are radium and accelerator produced isotopes. (H.R. Rep. 92-911, 92d Cong. 2d Sess., 131, March 11, 1972; 117 Cong. Rec. 17401, daily ed., November 2, 1971; 118 Cong. Rec. 9115, daily ed., October 4, 1972.)

* * * *

§ 125.2 *Scope and purpose.*

(a)(1) The regulations in this part prescribe the policy and procedures to be followed in connection with applications for federally issued permits authorizing discharges into the navigable waters, the waters of the contiguous zone, and the oceans, during the periods that the Administrator of the Environmental Protection Agency is authorized to issue such permits pursuant to sections 402 and 405 of the Act [33 U.S.C. (Supp. III) 1342, 1345].

Subsections e, s and t (redesignated z and aa) of Section 11 of the Atomic Energy Act of 1954, 68 Stat. 923, 924, as amended, 42 U.S.C. 2014(e), (z), (aa), read as follows:

e. The term "byproduct material" means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material.

* * * *

s. The term "source material" means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 61 [42 U.S.C. 2091] to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time.

t. The term "special nuclear material" means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 51 [42 U.S.C. 2071], determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material.

Sections 402(a)(1), (b), and (c)(1), 502(6), and 511(a)(1) of the Federal Water Pollution Control Act, as added thereto by the Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 880-882, 886, 893, 33 U.S.C. (Supp. III) 1342(a)(1), (b), and (c)(1), 1362(6) and 1371(a)(1) read in pertinent part as follows:

NATIONAL POLLUTANT DISCHARGE ELIMINATION SYSTEM

SEC. 402. (a)(1) Except as provided in sections 318 and 404 of this Act [33 U.S.C. (Supp. III) 1328, 1344], the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 301 (a) [33 U.S.C. (Supp. III) 1311(a)], upon condition that such discharge will meet either all applicable requirements under sections 301, 302, 306, 307, 308, and 403 of this Act [33 U.S.C. (Supp. III) 1311, 1312, 1316, 1317, 1318, 1343], or prior to the taking of necessary implementing actions relating to all such requirements, such conditions as the Administrator determines

are necessary to carry out the provisions of this Act.

• • • •

(b) • • • the Governor of each State desiring to administer its own permit program for discharges into navigable waters within its jurisdiction may submit to the Administrator a full and complete description of the program it proposes to establish and administer under State law or under an interstate compact. • • •

• • • •

(c)(1) Not later than ninety days after the date on which a State has submitted a program (or revision thereof) pursuant to subsection (b) of this section, the Administrator shall suspend the issuance of permits under subsection (a) of this section as to those navigable waters subject to such program unless he determines that the State permit program does not meet the requirements of subsection (b) of this section or does not conform to the guidelines issued under section 304(h)(2) of this Act [33 U.S.C. (Supp. III) 1314(h)(2)]. If the Administrator so determines, he shall notify the State of any revisions or modifications necessary to conform to such requirements or guidelines.

• • • •

GENERAL DEFINITIONS

SEC. 502. Except as otherwise specifically provided, when used in this Act:

• • • •

(6) The term "pollutant" means * * * radioactive materials * * * discharged into water. * * *

* * * *

OTHER AFFECTED AUTHORITY

SEC. 511. (a) This Act shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation not inconsistent with this Act; * * *.

QUESTION PRESENTED

Whether nuclear waste material, comprehensively regulated and controlled through licenses issued under the Atomic Energy Act by the successor agency to the Atomic Energy Commission, is a "pollutant" within the meaning of the Federal Water Pollution Control Act, which requires the Environmental Protection Agency to establish regulations and controls over pollutants by administering a detailed permit program.

STATEMENT

Prior to the decision below, the Atomic Energy Commission—now the Nuclear Regulatory Commission (NRC) and the Energy Research and Development Administration (ERDA)[2]—exercised exclusive authority in regulating radioactive effluents released

[2] NRC and ERDA succeeded to the powers of the Atomic Energy Commission on January 19, 1975, pursuant to the Energy Reorganization Act of 1974, 88 Stat. 1233-1254; see 40 Fed. Reg. 3242, 3520.

from NRC-licensed electrical power plants and from government research and production facilities operated by contractors for ERDA.

1. *The Atomic Energy Act.* The Atomic Energy Act of 1946 established a federal monopoly in the production and use of radioactive materials necessary to provide nuclear energy or created in the production of such energy. In 1954, Congress revised the Act to permit private parties to produce and utilize nuclear energy for peaceful purposes. But Congress conditioned private participation on compliance with a comprehensive and stringent federal licensing program designed to protect the common defense and the public health and safety. 42 U.S.C. 2011, *et seq.* Under this Act, the production, utilization and disposal of source,[3] special nuclear,[4] and by-product materials[5] may be accomplished only in accordance with licenses issued by the NRC.

[3] "The term 'source material' means (1) uranium, thorium, or any other material which is determined by the Commission pursuant to the provisions of section 2091 of this title to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time." 42 U.S.C. 2014(z).

[4] "The term 'special nuclear material' means (1) plutonium, uranium enriched in the isotope 233 or in the isotope 235, and any other material which the Commission, pursuant to the provisions of section 2071 of this title, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material." 42 U.S.C. 2014(aa).

[5] "The term 'byproduct material' means any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process

Nuclear power plants, which produce, use, and dispose of these materials, may be constructed and operated only pursuant to detailed NRC licenses.[6] Extensive NRC regulations limit permissible radioactive discharges (10 C.F.R., Parts 20, 30, 40, 50 and 70), and licenses issued by the NRC not only require compliance with these limits, but also prescribe the manner in which radioactive wastes are to be discharged from the plants. See 42 U.S.C. 2133, 2134, 2201(b), 2201(i), 2233.

2. *The Federal Water Pollution Control Act.* The Federal Water Pollution Control Act Amendments of 1972 (86 Stat. 816-896, 33 U.S.C. (Supp. III) 1251-1376) (FWPCA) required the Administrator of the Environmental Protection Agency (EPA) to set up a permit program in order to regulate the discharge of pollutants into the Nation's waterways. 33 U.S.C. (Supp. III) 1342.[7] Under the FWPCA, such discharges are forbidden unless made in accordance with a permit, which must ensure that discharges comply with established limits on pollutants.

On May 22, 1973, the Administrator of the EPA adopted regulations prescribing the policy and procedures to be followed in the issuance of federal permits authorizing discharges into the Nation's waters.

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of producing or utilizing special nuclear material." 42 U.S.C. 2014(e).

[6] The licensing procedures are described in *Power Reactor Development Co.* v. *Electricians*, 367 U.S. 396, 403-409.

[7] The States may issue permits under programs approved by the EPA. 33 U.S.C. (Supp. III) 1342.

40 C.F.R., Part 125. Although the FWPCA defines "pollutants" as including, *inter alia*, "radioactive materials * * * discharged into water," 33 U.S.C. (Supp. III) 1362(6), the Administrator concluded that Congress did not intend to subject to FWPCA controls by-product, source, or special nuclear material, which was already extensively regulated by the AEC under the Atomic Energy Act of 1954. Accordingly, 40 C.F.R. (1973 rev.) 125.1(x)[8] excludes those materials from the EPA permit program.

3. *The Proceedings Below.* Respondents commenced this suit under Section 505 of the FWPCA, 33 U.S.C. (Supp. III) 1365, which consents to "citizen suits" against EPA to require it to perform nondiscretionary duties under the FWPCA. Respondents alleged that the FWPCA required the EPA to define effluent limitations for all radioactive materials, including those controlled under the Atomic Energy Act of 1954.

The district court concluded that "two agencies of peculiar and extreme expertise" (App. C, *infra*, p. 21a), the AEC and the EPA, were correct in their conclusion that the FWPCA does not apply to source, special nuclear, and by-product material. The court relied upon the legislative history of the FWPCA (App. C, *infra*, p. 22a) and on the "wasted effort, * * * confusion, and possible danger to the public" likely to result from dual regulation (App. C, *infra*,

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[8] This subsection was subsequently redesignated 125.1(y). 38 Fed. Reg. 19895 (July 24, 1973).

p. 23a). The court also stated that requiring EPA to regulate effluents from AEC-licensed plants might have an adverse effect on energy supplies (App. C, *infra*, p. 26a).

The court of appeals reversed, holding that the plain meaning of the FWPCA requires the EPA to regulate discharges of all radioactive materials, including those controlled by the AEC.[9] Therefore, the court of appeals decided, "there is no need to address ourselves to the ofttimes difficult task of ascertaining legislative intent through legislative history" (App. B, *infra*, p. 12a). In the court's view, exclusive control over these materials had not been reserved to the Atomic Energy Commission by the Atomic Energy Act of 1954 because the FWPCA constituted a later expression of congressional intent to "vest the Environmental Protection Agency with the duty" of regulating such material (App. B, *infra*, p. 16a). The court concluded that the FWPCA was to that extent inconsistent with the Atomic Energy Act (*id.* at p. 14a).

REASONS FOR GRANTING THE WRIT

The decision below significantly impedes efforts to develop a nationwide system of nuclear power generation. By creating a redundant regulatory system

[9] The States of Arkansas, Kansas, Michigan, Minnesota, Pennsylvania, and Washington participated as *amici curiae* in the court of appeals, claiming that the 1972 changes to the FWPCA required the Administrator and the States to control all radioactive effluents.

for plant discharges, thereby fragmenting regulatory responsibility for nuclear facilities, the decision makes it more difficult to ensure uniform and consistent regulations, and the uncertainties it creates promise to delay construction and operation of nuclear power plants during a time of national energy shortages.[10] It does this despite clear indications that Congress intended no such result, and despite the lack of any desirable policy that would be served by such a regulatory pattern.

Each nuclear power facility is enormously complex. Its reliability depends not only on the proper functioning of each component system, but also on the proper interrelationship of the systems. The plant is, and must be assessed as, a unit, rather than simply a group of systems serving specific functions. Thus, decisions regarding the types and amounts of radioactive waste that may be discharged from a plant, and the extent to which any of these discharges may be to the air or water, necessarily must take into account the design and operation of the plant.[11] All these decisions together must produce a safe and efficient plant, with discharges which will not ad-

[10] Presently, 116 nuclear power plants have been licensed by NRC to operate or to be constructed; applications to build 74 others are pending.

[11] For example, a plant could be designed to minimize radioactive effluent discharges by permitting somewhat greater airborne discharges; this design decision could affect not only the discharge systems, but also the method of operation of the facility, and the types of controls required for safety.

versely affect either the public health and safety or the environment.

Until the decision below, NRC, and its predecessor, the AEC, had exclusive regulatory jurisdiction over the design of nuclear power facilities and had exclusive authority to regulate their radioactive waste discharges. *Northern States Power Co.* v. *Minnesota*, 447 F.2d 1143 (C.A. 8), affirmed, 405 U.S. 1035.[12] This centralization of control and responsibility in a single agency ensured that all interrelated aspects of facility design received consistent and coherent review, and minimized problems of interagency coordination in review of a single project. See *Northern States Power Co.* v. *Minnesota, supra*, 447 F.2d at 1153.[13] The court of appeals, however, has now created overlapping regulatory authority among two federal agencies at least in regard to discharges from nuclear plants into the water.

Moreover, the opinion below creates uncertainty in an area where certainty is essential. The planning and construction of nuclear power facilities is a costly, long-range undertaking. The time from a

[12] The EPA, in contrast, has authority to establish generally applicable environmental standards for radioactive materials in the environment, but had no direct authority over the discharges from the plants themselves. Reorganization Plan No. 3 of 1970, Section 2(a)(6), 84 Stat. 2086, 2088; Memorandum of Understanding, 38 Fed. Reg. 2713 (January 29, 1973).

[13] Centralization is similarly important in the design, construction and operation of government-owned nuclear research and production facilities, including those in which nuclear weapons are produced.

utility's initial decision to construct a nuclear facility to the full-scale operation of that facility typically is from eight to ten years; and the costs range from a quarter of a million to more than a billion dollars. It is thus extremely important to a utility considering whether to undertake such a venture that the standards with which the completed plant must comply are accurately predictable at the outset. Further, a utility is unlikely to start a venture of this size if there is any substantial uncertainty that the necessary permits for the operation of the facility will be available.

Because of its responsibility for protecting the public health and safety and the environment,[14] the AEC (and now the NRC) has acquired a high degree of expertise in regard to the many possible effects of discharges of nuclear wastes into water. See *Crowther* v. *Seaborg*, 312 F. Supp. 1205, 1220 (D. Colo.). It has issued regulations, reflecting this expertise, which restrict discharges into the environment, including the water. 10 C.F.R., Part 20; 50.34a; 50.36a. These regulations are implemented by the NRC through design criteria for nuclear facilities. If EPA must now establish its own standards, and issue its own regulations covering discharges of precisely the same wastes, confusion and uncertainty are very likely to result. If the EPA standards turn out to be different from those currently applicable,

[14] See 42 U.S.C. 4331, *et seq.*

facility designs and operations would have to be revised to accommodate them, with potential delays, expenses and safety problems to be resolved. If they are the same as the AEC standards, nothing will have been gained by the duplication; the procedures and paperwork necessary to construct and operate a nuclear power plant will simply have been increased, in contravention of the policy of the FWPCA. 33 U.S.C. (Supp. III) 1251(f).

In addition, the decision below may be read by some States as authorizing them to impose radioactive effluent limitations more stringent than those adopted by EPA (see *amicus curiae* brief of Arkansas, Kansas, Michigan, Pennsylvania and Washington below, p. 4). While we believe that this interpretation is incorrect, it is colorable, in view of the emphasis in the FWPCA on the primary responsibility of the States for controlling water quality. 33 U.S.C. (Supp. III) 1251(b).[15]

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[15] *Northern States Power Co.* v. *Minnesota, supra,* held that the Atomic Energy Act of 1954 gave the AEC exclusive authority to regulate discharges from nuclear facilities. The court below read the FWPCA as indicating a congressional reconsideration of the necessity for retaining sole regulatory control in the AEC (App. B, *infra,* p. 16a). But a proposed amendment which would have permitted the States to impose limitations on the discharges of radioactive materials more stringent than the federal limitations was defeated in the House of Representatives by a vote of 106 to 36, after concern was expressed in debate that the effect of the amendment would be to amend the Atomic Energy Act of 1954 and reverse the decision in *Northern States.* 118 Cong. Rec. 10648-10654; 1 Committee Print, A Legislative History of the Water

The uncertainty about the States' authority to license such discharges, and, if they have the authority, the manner in which they will exercise it, will have a profoundly discouraging effect on plans to construct nuclear power plants. Since the design of the plant depends on its site, decisions about siting must be made in the earliest planning stages. Extremely restrictive state standards could effectively prohibit the construction of nuclear power plants within the State.[16] Therefore, if the FWPCA applies to radioactive discharges from nuclear plants, as the court below held, plants may simply not be planned for States where such restrictive regulation might be anticipated [17] until the question of state authority to

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Pollution Control Act Amendments of 1972 Together With A Section-by-Section Index, prepared by the Environmental Policy Division of the Congressional Research Service of the Library of Congress, 93d Cong., 1st Sess., 542-557 (hereafter "Leg. Hist.").

[16] Such standards, if applicable to federal facilities, could also prevent the construction of federal nuclear facilities. We argue in our pending petition for a writ of certiorari in *Seeber* v. *State of Alabama,* No. 74-851, that federal facilities need not obtain state air pollution control permits. We would also argue that they need not obtain state effluent permits, but this contention has been rejected by one court of appeals, which noted that, because of distinctions between the relevant federal statutes, decisions involving one type of state permit may not control in cases involving the other type. *California* v. *Environmental Protection Agency,* C.A. 9, No. 73-2466, decided February 13, 1975, slip op. 17.

[17] Eleven states have bills pending before their legislatures which attempt either to impose a complete moratorium on the construction of nuclear power plants or to restrict such construction severely. These states are: Connecticut, Indiana,

regulate those discharges is finally resolved."

These problems are of substantial concern to the utilities considering the construction of nuclear facilities, and may seriously affect the national interest in having adequate supplies of energy for future needs. See App. C, *infra*, p. 26a. The Federal Energy Administration, whose function is to "advise the President and the Congress with respect to the establishment of a comprehensive national energy policy," P.L. 93-275, 88 Stat. 96, 99, believes that the decision below may "adversely impact upon any expansion of the role of nuclear power in meeting the nation's energy needs, and thereby serve to frustrate the President's stated goal of having 200 major nuclear power plants within the next ten years" (App. D, *infra*, p. 31a).

Congress did not intend the FWPCA to have any such effect. The court below concluded that the statutory language was clear, and that resort to legislative history was therefore inappropriate (App. A, *infra*, pp. 12a-13a). This approach to statutory interpretation has been repeatedly rejected by this Court. See, *e.g.*, *Boston Sand & Gravel Co.* v. *United States*, 278 U.S. 41, 48; *Cass* v. *United States*, 417 U.S. 72, 77-79.

Iowa, Kansas, Massachusetts, Minnesota, Missouri, Nebraska, Oklahoma, Oregon, and Wisconsin. Vermont recently enacted such legislation. In addition, California has a pending initiative designed to impose severe restraints on such construction, and the Texas legislature has asked its congressional delegation to propose national legislation to that effect.

[18] Even if a utility were willing to risk the uncertainty and plan a facility in such a State, financing the venture might well be impossible because of lenders' unwillingness to take that risk.

The term "radioactive materials," which is nowhere defined in the FWPCA, is ambiguous in light of the other provisions of that Act and of the Atomic Energy Act. See *Chemehuevi Tribe of Indians* v. *Federal Power Commission*, No. 73-1380, decided March 3, 1975, slip op. 7-8; *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, 250. In 33 U.S.C. (Supp. III) 1371(a)(1), Congress specifically stated that the FWPCA is not to be construed as limiting the authority of any federal agency under any other law not inconsistent with the FWPCA. Congress also required in 33 U.S.C. (Supp. III) 1251(f) that the Act be implemented in a way that "prevents needless duplication and unnecessary delays at all levels of government." Since the Act supplements, but does not override or duplicate, related statutory provisions, Congress could not have intended to require the EPA to regulate the type of radioactive waste material already extensively and comprehensively controlled under the Atomic Energy Act of 1954.

The legislative history of the FWPCA fully supports the conclusion that Congress intended to leave exclusive control of such effluents to the AEC. The House Committee Report, H. Rep. No. 92-911, 92d Cong., 2d Sess. 131, 1 Leg. Hist. 753, 818, could hardly be more explicit:

> The term "pollutant" as defined in the bill includes "radioactive materials." These materials are those not encompassed in the definition of

> source, byproduct, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to that Act. "Radioactive materials" encompassed by this bill are those beyond the jurisdiction of the Atomic Energy Commission. Examples of radioactive material not covered by the Atomic Energy Act, and, therefore, included within the term "pollutant," are radium and accelerator produced isotopes."

The Senate debates indicate that this interpretation of the statutory language was shared by that body as well (2 Leg. Hist. 1265-1266).

Congress realized full well that regulation of the same subject by separate federal agencies, and the consequent problems that might arise from varying requirements, each aimed at achieving the same goal in a different way, would be particularly undesirable in regard to radioactive material used, produced and discharged from nuclear facilities. However, by requiring the EPA to promulgate regulations dealing with the discharge of this material into the water and to include such discharges in its own independent permit program, the court below has created a redundant pattern of regulation, with all the problems and uncertainties Congress sought to avoid. In short, the decision of the court of appeals is contrary to the FWPCA, and does nothing to advance the national policy of protecting the environment. Indeed, the regulatory system that would evolve if this decision stands is one that would be, in our view, contrary to the public interest.

[19] The Conference bill, which was enacted (1 Leg. Hist. 282), contains an identical definition of "pollutant." 1 Leg. Hist. 326-327. Representative Harsha, a member of the Conference Committee, explained to the House that in this respect the Conference bill "in no way detracted from the intent of the language in" the House bill, and that the term "radioactive materials" in the conference bill continued to refer only to materials not within the jurisdiction of the AEC (1 Leg. Hist. 226-227).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APRIL 1975.

APPENDIX A

NOVEMBER TERM—DECEMBER 9, 1974

Before The Honorable William J. Holloway, Jr., The Honorable Robert H. McWilliams, Circuit Judges and The Honorable A. Sherman Christensen, District Judge *

No. 74-1154

(D. C. No. C-5438)

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., a nonprofit Colorado Corporation, COLORADO ENVIRONMENTAL LEGAL SERVICES, INC., a nonprofit Colorado Corporation, MORGAN SMITH, FRANK ANDERS, A. M. WINCHESTER, and FRANK L. BOULTER, PLAINTIFFS-APPELLANTS

v.

RUSSELL TRAIN, as Administrator of the United States Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of said court is reversed. The cause is remanded to the United States District Court for

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* Of The District of Utah, sitting by Designation.

the District of Colorado for further proceedings in accordance with the opinion of this court.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 74-1154

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., a nonprofit Colorado Corporation, COLORADO ENVIRONMENTAL LEGAL SERVICES, INC., a nonprofit Colorado Corporation, MORGAN SMITH, FRANK ANDERS, A. M. WINCHESTER, and FRANK L. BOULTER, PLAINTIFFS-APPELLANTS

v.

RUSSELL TRAIN, as Administrator of the United States Environmental Protection Agency; and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS-APPELLEES

Appeal from the United States District Court
for the District of Colorado

(D. C. No. C-5438)

David C. Mastbaum and James L. Kurtz-Phelan (David E. Engdahl on the brief), for Plaintiffs-Appellants.

Dirk D. Snel, Attorney, Department of Justice (Wallace H. Johnson, Assistant Attorney General, James L. Treece, United States Attorney, William K. Hickey, Assistant United States Attorney, and Edmund B. Clark and Michael D. Graves, Attorneys, Department of Justice, on the brief), for Defendants-Appellees.

Jim Guy Tucker, Attorney General of Arkansas; Vern Miller, Attorney General of Kansas; Frank J. Kelley, Attorney General of Michigan; William M. Eichbaum, Deputy Secretary for Enforcement and General Counsel, Pennsylvania Department of Environmental Resources; and Slade Gorton, Attorney General of Washington; on the brief of The State of Arkansas, The State of Kansas, The State of Michigan, The Commonwealth of Pennsylvania, and The State of Washington, as Amici Curiae.

Warren Spannaus, Attorney General; Peter W. Sipkins, Solicitor General; and Eldon G. Kaul, Special Assistant Attorney General; on the brief of The State of Minnesota, as Amicus Curiae, and joint brief of the Minnesota Pollution Control Agency, as Amicus Curiae.

Before HOLLOWAY and McWILLIAMS, Circuit Judges, and CHRISTENSEN*, District Judge.

McWILLIAMS, Circuit Judge.

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* Of the District of Utah, sitting by designation.

This is a citizen suit brought by plaintiffs against the United States Environmental Protection Agency, and Russell Train as its Administrator, wherein the plaintiffs, under the provisions of the Federal Water Pollution Control Act, as amended, sought to compel the Administrator to perform what was alleged to be a nondiscretionary duty to control discharges of radioactive materials into navigable waters. Both plaintiffs and defendants moved for summary judgment on the ground that there were no genuine issues of fact and both agreed that the sole issue was a pure question of law as to the meaning of the Federal Water Pollution Control Act, as amended, 33 U.S.C. § 1251, *et seq.* (Supp. 1973). The trial court granted defendants' motion for summary judgment and entered summary judgment for defendants.[1] Plaintiffs now appeal the judgment thus entered. We reverse.

We are here concerned with the amendments made in 1972 to the Federal Water Pollution Control Act, and the regulations issued pursuant thereto. The amendments thus made to the Act will hereinafter be referred to as the 1972 Amendments. This is a statutory construction case, and accordingly we shall now refer to the particular statutes and administrative regulations with which we are here concerned.

33 U.S.C. § 1311(a) (Supp. 1973) provides, in effect, that the discharge of any pollutant by any

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[1] *See* Colorado Public Interest Group, Inc. v. Train, 373 F.Supp. 991 (D.C.Colo. 1974).

person into navigable waters shall be unlawful except in compliance with the various sections of the 1972 Amendments. Under 33 U.S.C. § 1342(a)(1) (Supp. 1973) the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, upon the meeting of such conditions as the Administrator determines to be necessary to carry out the several provisions in the Act, as amended.

33 U.S.C. § 1362(6) (Supp. 1973) defines "pollutants" and reads as follows:

> "The term 'pollutant' means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, *radioactive materials*, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. *This term does not mean* (A) 'sewage from vessels' within the meaning of section 1322 of this title; or (B) water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil or gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if such State determines that such injection or disposal will not result in the degradation of ground or surface water resources." (Emphasis added).

The Administrator, pursuant to his obligations under 33 U.S.C. § 1342 (Supp. 1973), issued regulations which became effective July 1, 1973, regarding permits to discharge pollutants. 40 C.F.R. § 125.1(x) (1973) reads in pertinent part as follows:

> "§ *125.1 Definitions*
>
> "(x) The term 'pollutant' means * * * radioactive materials * * * discharged into water. [Fifteen other listed pollutants omitted.] * * *.
>
> "COMMENT.—The legislative history of the [Federal Water Pollution Control] Act 'Amendments of 1972' reflects that the term 'radioactive materials' as included within the definition of 'pollutant' in section 502 of the Act covers only radioactive materials which are not encompassed in the definition of source, by-product, or special nuclear materials as defined by the Atomic Energy Act of 1954, as amended, and regulated pursuant to the latter Act. Examples of radioactive materials not covered by the Atomic Energy Act and, therefore, included within the term 'pollutant' are radium and accelerator produced isotopes. (H.R.Rep. 92-911, 92d Cong. 2d Sess., 131, March 11, 1972; 117 Cong.Rec. 17401, daily ed., November 2, 1971; 118 Cong.Rec. 9115, daily ed., October 4, 1972.)"

The foregoing COMMENT is at the heart of the present dispute and perhaps deserves a rereading.

Another section of the 1972 Amendments, 33 U.S.C. § 1371(a) (Supp. 1973), relied on by the defendants, reads in pertinent part as follows:

> "This chapter shall not be construed as (1) limiting the authority or functions of any officer or agency of the United States under any other law or regulation *not inconsistent with this chapter*; * * *." (Emphasis added).

Although neither is a party to the present proceeding, the Atomic Energy Commission and the Public Service Company of Colorado are to a degree, at least, involved. The Atomic Energy Commission owns the Rocky Flats Plant located between Golden and Boulder, Colorado, which plant until recently has been operated for the Commission by the Dow Chemical Company. The Public Service Company of Colorado under license from the Atomic Energy Commission owns and maintains the Fort St. Vrain Nuclear Generating Station located at Platteville, Colorado. Radioactive materials, including "by-products materials," "source material," and "special nuclear material" are, or will be, discharged into navigable waters within the state of Colorado by operation of the Rocky Flats Plant and the Fort St. Vrain Nuclear Generating Station. We are advised that both nuclear facilities have applied to the EPA Administrator for a permit to authorize the discharge of liquid effluents into Colorado waters and that in each instance the Administrator, in line with the COMMENT set forth above, has refused to regulate the discharge of radioactive materials from these facilities.

It was in this general setting that the plaintiffs brought their citizen suit as provided in 33 U.S.C. § 1365(a)(2) (Supp. 1973) against the Administrator seeking to compel him to exercise his regulatory duties under the 1972 Amendments as concerns the discharge of radioactive materials into navigable waters. It is the plaintiffs' basic position that the

statute means what it says, and that under the definition of "pollutant," as set forth in 33 U.S.C. § 1362 (6) (Supp. 1973), it is the duty of the Administrator to regulate the discharge of *all* radioactive materials into navigable waters.

The defendants' basic position is as set forth above in the COMMENT to 40 C.F.R. § 125.1(x) (1973), namely, that those radioactive materials which are "by-product materials," "source material," and "special nuclear material" are not encompassed in the 1972 Amendments and are hence subject to only such regulation as is provided under the Atomic Energy Act of 1954. The trial court adopted the view of the Administrator and it was on this basis that summary judgment was entered for the defendants. We disagree with this disposition of the matter. Brief reference to the general law relating to statutory construction may be helpful.

It is a basic rule of statutory construction that statutes are to be construed in a manner so as to effectuate the intent of the enacting body, and that in construing a statute the court should first look to the language of the statute itself. If the language is clear and the purpose appears with reasonable certainty, there is no need to resort to other rules of construction to ascertain its meaning. United States v. Ray, 488 F.2d 15 (10th Cir. 1973). An unambiguous statute must be given effect according to its plain and obvious meaning. United States v. Western Pacific Railroad Company, 385 F.2d 161 (10th Cir. 1967).

Another cardinal rule of statutory construction is that where the legislature has acted to except certain categories from the operation of a particular law, it is to be presumed that the legislature in its exceptions intended to go only as far as it did, and that additional exceptions are not warranted. In other words, where there be express exceptions to a statute, additional exceptions by implication are not favored. *In re* Monks Club, Inc., 394 P.2d 804 (Wash. 1964), and Knapczyk v. Ribicoff, 201 F. Supp. 283 (N.D.Ill. 1962). *See also* 2A Sands, Statutes and Statutory Construction, § 47.11 (4th ed. 1973), where it is stated that when there is an express exception to a statute, no other exceptions will be implied. *See also* § 47.07 in that same treatise which states, in part, that a statute which declares what a term "means," is to be given a strict interpretation and is not subject to expansion. Here, the statute declares not only what the term pollutant "means," but what it "does not mean."

And a final rule of construction which has applicability to the present controversy is that the legislative history of a statute cannot be used to change the meaning of a clear and unambiguous statute. United States v. Oregon, 366 U.S. 643 (1961), and *Ex Parte* Collett, 337 U.S. 55 (1949). Or, as was well stated in Gemsco, Inc. v. Walling, 324 U.S. 244, at 260 (1945), "the plain words and meaning of a statute cannot be overcome by a legislative history which, through strained processes of deduction from events of wholly ambiguous significance, may furnish dubious bases for inference in every direction." *See also* United States v. Zions Savings & Loan Association, 313 F.2d 331 (10th Cir. 1963), and Haskell v. United States, 241 F.2d 790 (10th Cir. 1957).

Keeping these general rules in mind let us look at the various statutory provisions with which we are here concerned. It was the expressed general intent of Congress in the 1972 Amendments to enact a comprehensive program looking towards the eventual elimination of all pollution of the Nation's waterways so as to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251 (1973 Supp.). And the term "pollution" was defined as meaning "the man-made or man-induced alteration of the chemical, physical, biological and radiological integrity of water." 33 U.S.C. § 1362(19) (Supp. 1973). The EPA Administrator was generally charged with carrying out the intent behind the 1972 Amendments, and was specifically charged with the administration and enforcement of the several provisions of the statute.

In essence the sections referred to at the outset of this opinion prohibit the discharge of pollutants into navigable waters unless a permit to do so be granted by the EPA Administrator, and the EPA Administrator in considering a request to thus discharge pollutants is subject to the various requirements and limitations provided for in the Act and amendments thereto. The statute then defines the term "pollutant," and states that among other things the term

"polluant means • • • radioactive materials • • •." The statute does not say "some" radioactive materials, or radioactive materials "except for," just "radioactive materials." So, it would seem to us that if we give the words thus used in the statute their plain and obvious meaning, the EPA Administrator is charged with the duty of regulating the discharge of radioactive materials into navigable waters. No exceptions having been set forth in the statute as concerns radioactive materials, it would follow that the term "radioactive materials" means *all* radioactive materials, and we so hold.

We are fortified in our conclusion in this regard by the fact that the statute defining "pollutants" does contain two exceptions, neither of which modifies the term "radioactive materials." Under the rule of construction referred to above, where a statute contains express exceptions, the courts should be exceedingly slow in implying unexpressed exceptions, lest the courts thereby thwart the legislative intent.

In our view, then, the statute is plain and unambiguous and should be given its obvious meaning. Such being the case, under the authorities above cited, we need not here concern ourselves with the legislative history of the 1972 Amendments. In this regard we would note parenthetically that in our view the legislative history of the 1972 Amendments is conflicting and inconclusive. Be that as it may, in the case before us there is no need to address ourselves to the ofttimes difficult task of ascertaining legislative intent through legislative history. Here,

the legislative intent is clearly manifested in the language of the statute itself, and we need not resort to legislative history. United States v. Oregon, *supra*, and *Ex Parte* Collett, *supra*.

As indicated, the main thrust of the defendants' argument in this court is that if there is not in fact an ambiguity in the 1972 Amendments, at least the 1972 Amendments are possessed of an "unfinished character" which requires it to be juxtaposed with the Atomic Energy Act of 1954. The defendants urge that if the 1972 Amendments be so considered, then "by-products materials," "source material," and "special nuclear material" are under the Atomic Energy Act of 1954 specifically subjected to the control of the Atomic Energy Commission, which control includes the exclusive power to regulate the discharge of such radioactive materials; and that the Atomic Energy Commission has been, and is, thus regulating the discharge of such radioactive materials. Thus, according to the defendants, the Administrator under the 1972 Amendments only regulates the discharge of "other" radioactive materials, such as radium and accelerator produced isotopes. All of which is of course in line with the COMMENT of the EPA in 40 C.F.R. 125.1(x) (1973). Suffice it to say that this line of argument does not square with our reading of the 1972 Amendments. In this regard we are of course mindful of the rule that the construction given a statute by the administrative officer charged with carrying out its provisions is to be given weight. Board of Dir. & O., Forbes Fed.

Cr. U. v. National Cr. U. Adm., 477 F.2d 777 (10th Cir. 1973). However, such should not be permitted to overrule the express language of a statute, else the administrative officer will himself be thwarting the will of Congress. Or, as was said in Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933), "administrative practice does not avail to overcome a statute so plain in its commands as to leave nothing for construction."

In support of its general line of reasoning the defendants cite that section of the statute which states that the 1972 Amendments are not to be construed as limiting the functions of any officer or agency acting under any other law or regulation "not inconsistent with this chapter." 33 U.S.C. § 1371(a) (Supp. 1973). Our answer to that is that the 1972 Amendments are inconsistent, in the particulars indicated, with the Atomic Energy Act of 1954.

We are advised that this is a case of first impression. However, a case which addressed itself to a somewhat similar problem is Scenic Hudson Preservation Conference v. Callaway, 370 F.Supp. 162 (S.D.N.Y. 1973). The 1972 Amendments provide that a permit to discharge dredged or fill material is to be obtained from the Secretary of the Army, acting through the Chief of Engineers, rather than the Administrator. 33 U.S.C. § 1344 (Supp. 1973). However, Consolidated Edison, which was in the process of trying to build a hydroelectric generating plant, contended that since it was under the general jurisdiction of the Federal Power Commission, it was

not required to get a permit from the Army Corps of Engineers. In rejecting such contention, that court stated as follows:

> "* * * Con Ed would infer an exception from the Amendments for hydroelectric plants on the theory that Congress could not have intended to interfere with the jurisdiction of the FPC in view of the long settled policy, discussed above, of allowing that agency unique control over the production of hydroelectric power. The argument is persuasive at first blush, but even more plausible is plaintiffs' contention that Congress would not design an Act which on its face is all-inclusive, but for specifically enumerated exceptions, and yet intend to establish an unmentioned exception of the scale suggested here. Without any indication that Con Ed's reading of the Congressional will is accurate, the carving out of so major an exception would be improper. If this was Congress' intention and the omission is mere oversight, the remedy rests in Congress' hands, and Congress has shown, by its recent amendments to the Alaska pipeline legislation, that it will not hesitate to remove an obstacle to energy production when it believes a change of requirements is necessary in the public interest."

We generally concur with the reasoning of this *Scenic Hudson* case. We are advised in the instant case that "by-product material," source material," and "special nuclear materials" constitute virtually all of the radioactive materials that are of significant concern to water quality, and if such materials

are excepted from the 1972 Amendments, then the exception is devouring the general policy of the statute. Edward B. Marks Music Corp. v. Colorado Mag., Inc., 497 F.2d 285 (10th Cir. 1974). In any event, if in the 1972 Amendments Congress intended to except "by-product materials," "source material," and "special nuclear material" when it used the unmodified term "radioactive material," then the omission should be corrected by Congress, and not the courts.

A case mentioned by the trial court in its memorandum opinion and cited here by the defendants is Northern States Power Company v. State of Minnesota, 447 F.2d 1143 (8th Cir. 1971), *aff'd*, 405 U.S. 1035 (1972). We do not deem that case to be particularly helpful in our resolution of the present case. That case stands for the proposition that Congress in enacting the Atomic Energy Act of 1954 preempted the field to the exclusion of the several states as concerns the regulation of radioactive waste releases from nuclear power plants. Assuming the correctness of this proposition, such does not mean that Congress is thereafter foreciosed from later deciding, as we believe it did, to vest the Environmental Protection Agency with the duty of regulating the discharge of all radioactive materials into navigable waters.

In sum, then, the 1972 Amendments charge the EPA Administrator with the duty of regulating the discharge of all radioactive materials into the Na-

tion's waters, and the trial court erred in granting the defendants' motion for summary judgment.

The trial court denied plaintiffs' request for reasonable attorney fees as provided in 33 U.S.C. § 1365 (d) (Supp. 1973). Plaintiffs appeal this ruling and contend that such constituted an abuse of discretion on the part of the trial court. In view of our disposition of the appeal, we need not here address ourselves to the merit of that particular matter.

Judgment reversed and cause remanded for further proceedings consonant with the views herein expressed.

[December 9, 1974]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. C-5438

COLORADO PUBLIC INTEREST RESEARCH GROUP, INC., ET AL., PLAINTIFFS

vs.

RUSSELL TRAIN, as Administrator of the United States Environmental Protection Agency, and UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, DEFENDANTS

MEMORANDUM OPINION GRANTING
SUMMARY JUDGMENT

WINNER, Judge

The case is before the Court on cross-motions for summary judgment, and the parties agree that there are no genuine issues of material fact. The case involves plaintiff's challenge of the accord worked out between and followed by the Atomic Energy Commission and the Environmental Protection Agency as to the correlation of the Federal Water Pollution Control Act and the Atomic Energy Act. Plaintiffs want the EPA to regulate the discharge of "byproduct materials," "source materials" and "special nuclear materials" from the Ft. St. Vrain Generating Facility, a privately owned nuclear electrical generating plant, and from the Rocky Flats Plant, a

federally owned plant. The EPA and the AEC think that the regulation of the discharge of these particular materials is under the exclusive jurisdiction of the AEC and that such regulation is not under either the exclusive or the concurrent jurisdiction of the EPA. The Public Service Company of Colorado, the owner of the Ft. St. Vrain facility, has not been named as a defendant. Defendants have not raised the indispensable party question, and no ruling is made on it. Certainly the problem exists.

As phrased by plaintiffs in their brief, "The only issue before the Court is whether all radioactive effluents are subject to regulation pursuant to the 1972 Amendments to the Federal Water Pollution Control Act. 33 U.S.C. § 1251, et seq. . . . Simply stated, it is our position that this administrative decision [to leave the regulation of such effluents to the AEC] is totally contrary to the clear and unambiguous language of the 1972 Amendments to the Federal Water Pollution Control Act."

Defendants concede that the Federal Water Pollution Control Act gives the EPA power to regulate the discharge of "pollutants" and that some radioactive materials are indeed pollutants. But, say defendants, "byproduct," "source" and "special nuclear materials" must be treated differently, and, defendants have concluded that, reading the two Acts together, the regulation of discharges of those materials is for the AEC alone.

Necessarily, then, the starting place is a definition of the critical terms, and they are defined by statute:

42 U.S.C. 2014 (e) defines "*byproduct material*" as "any radioactive material (except special nuclear material) yielded in or made radioactive by exposure to the radiation incident to the process of producing or utilizing special nuclear material."

42 U.S.C. 2014 (z) defines "*source material*" as "(1) uranium, thorium, or any other material *which is determined by the Commission* pursuant to the provisions of section 61 to be source material; or (2) ores containing one or more of the foregoing materials, in such concentration as the Commission may by regulation determine from time to time."

42 U.S.C. 2014 (aa) defines "*special nuclear material*" as "(1) plutonium, uranium enriched in the isotope 233 or in the isocope 235, and any other material which the Commission, pursuant to the provisions of section 51, determines to be special nuclear material, but does not include source material; or (2) any material artificially enriched by any of the foregoing, but does not include source material."

The Federal Water Pollution Control Act [33 U.S.C. § 1362 (6)] defines pollutants, and, included in a list of specified pollutants are "radioactive materials." The Environmental Protection Agency has in effect defined the "radioactive materials" included under its control in 38 Fed. Reg. 13530, published May 22, 1973:

> ". . . the term *radioactive materials* as included within the definition of *pollutant* in section 502 of the Act covers only radioactive materials

> which are *not* encompassed in the definition of source, byproduct or special nuclear materials as defined by the Atomic Energy Act of 1954."

At the outset, plaintiffs face the hurdle that two agencies of peculiar and extreme expertise reach a conclusion diametric to the position of plaintiffs, and, certainly, the determinations of these agencies in this highly technical area are entitled to great weight. The height of the hurdle which plaintiffs must clear is not lowered by their flailing at the alleged incompetence of the AEC and by their charges that the AEC is impervious to the need for environmental protection and to the requirements of public safety. Such may be plaintiffs' views, but I am more persuaded by the comments of Chief Judge Arraj in *Crowther* v. *Seaborg*, 312 F. Supp. 1205, 1235, and, by the conclusions of Judge Hill in *Crowther* v. *Seaborg*, 415 F. 2d 437:

> ". . . the Atomic Energy Commission and the other cooperating governmental agencies are exercising the highest degree of care, caution and expertise to prevent any possible damage to life, property and natural resources."

Significantly, in the 90 pages of brief and supporting material filed by plaintiffs, no mention is made of either decision in *Crowther* v. *Seaborg*, but I am more inclined to adopt the view of our Chief Judge and the views of the Tenth Circuit than I am the views of the author of some obscure magazine article relied upon in plaintiffs' brief. I totally reject all

arguments that the AEC and the EPA are not doing their best to protect the public health, safety and welfare. With the rejection of those arguments, there is not a great deal left of plaintiffs' brief, and, both parties being in agreement that there is no genuine issue of material fact, I grant defendants' motion for summary judgment. I grant it for these reasons:

1. Although plaintiffs can winnow a little solace from the 1725 pages of legislative history of the Water Pollution Control Act Amendments of 1972, the history overwhelmingly favors the interpretation placed on the Act and, more particularly, on § 502 of the Act, by the AEC and the EPA. That interpretation, oversimplified, is that the AEC has the exclusive jurisdiction over effluents from "source," "byproduct" and "special" nuclear materials. This legislative history must be read with the thought in mind that 33 U.S.C. § 1362 (6) mentions "radioactive materials," but it doesn't say *all* radioactive materials, and, with this thought in mind the legislative history, convinces me that Congress didn't intend to give the EPA jurisdiction over those materials. No point would be served by quoting the Congressional Record here, but I mention 117 Cong. Rec. S 17401-402; the Report of the House Committee on Public Works on H.R. 11896, and the floor debate on that bill, 118 Cong. Rec. H. 2639. Other portions of the Congressional Record support defendants' position.

2. Perhaps it is possible for both the EPA and the AEC to regulate wastes of "source," "byproduct" and "special" nuclear materials, but

for both to try to do so would be likely to create not only wasted effort, but, worse, confusion, and possible danger to the public. Recognizing that *Northern States Power Company* v. *State of Minnesota* (1971) 8 Cir. 447 F. 2d 1143, had to do with joint state and federal regulation and recognizing that the preemption problem was paramount in the case, nevertheless, many of Chief Judge Matthes' comments in the decision are fully applicable here. I quote from p. 1148-1149 of that opinion:

"Federal regulation over the processing and use of source, by-product and special nuclear material and over production and utilization facilities was insured in the 1954 amendments by means of this comprehensive licensing system required by the Act. Moreover, the importance with which Congress viewed the maintenance of a federal system of regulation and control in this area is revealed in its findings, which are replete with policy statements concerning the need for regulation in the national interest in order to provide for the common defense and security and to protect the health and safety of the public. 42 U.S.C. § 202.

"We are more concerned here with subsection (c) of § 2021 which *prohibits* the AEC from discontinuing its authority and responsibility with respect to the regulation of certain specified activities including 'the construction and operation of any production or utilization facility,' which would include the discharge of radioactive effluents from the facility or plant.

"There can be no doubt but the AEC control over 'the construction and operation of any pro-

duction or utilization facility' necessarily includes control over radioactive effluents discharged from the plant incident to its operation. In analyzing § 2021(c) (1) in the Hearings before the Joint Committee on Atomic Energy, Mr. Lowenstein of the AEC at p. 306 explained:

> 'The activities covered under this provision (i) include but are not limited to the possession and storage at the site of the licensed activity of nuclear fuel, and of source special nuclear material and by-product materials used or produced in the operation of the facility; and the transportation of nuclear fuels to and from the reactor site and the discharge of effluent from the facility.
>
> 'Coming to the question you asked before, Mr. Ramey [Executive Director, Joint Committee], the purpose of this provision is to retain under Commission regulatory control the operation of the reactor. We did not feel that we could begin to cut up that into pieces, so to speak. The discharge of effluent from the reactor involve many questions relating to the design and construction and operating procedures. We did not think it could be considered by itself and broken away from overall responsibility for the reactor operation.'

"However, Minnesota interprets this subsection only as prohibiting *total* relinquishment by the federal government over nuclear power plants, but does not view the concurrent exercise of state control over nuclear facilities as being forbidden by the Act.

> "We cannot agree with Minnesota's position that dual control over atomic power plants and the level of effluents discharged therefrom is permissible under the Act. While the 1959 amendment does not use the terms 'exclusive' or 'sole' in describing existing regulatory responsibilities of the Commission, we think it abundantly clear that the whole tone of the 1959 amendment, upon examination of the statutory language alone, demonstrates Congressional recognition that the AEC at that time possessed the sole authority to regulate radiation hazards associated with by-product, source, and special nuclear materials and with production and utilization facilities." [Emphasis by the Court.]

The dissent in *Northern States Power Company* is much in line with the arguments of plaintiffs here, but I agree with the majority opinion in that case.

> 3. Threading through the two *Crowther* v. *Seaborg* opinions and through *Northern States Power Company* is the thought that when we deal with nuclear power, we are in the most highly specialized and potentially dangerous area known to our civilization. The EPA has enough problems without exercising joint jurisdiction with the AEC. We must make haste slowly in taking from the AEC the exclusive power to regulate and control nuclear energy. As I read the statute and its legislative history, Congress has not said that it wants the EPA to enter this dangerous field. It has given the AEC control, and I think that it has given the AEC exclusive control. I cannot find that the AEC and the EPA were in error in their read-

ing of the statute and in their reading of the Congressional intent.

4. An additional, although not controlling reason for my ruling is the energy crisis. To grant the relief requested by plaintiffs might shut down the federally owned Rocky Flats Plant and it would inevitably delay the coming on stream of the Ft. St. Vrain Generating Facility. I need not and do not rule on defendants' argument that plaintiffs have other remedies available to them. I simply hold that if the Rocky Flats Plant is to be shut down, or if the Ft. St. Vrain Generating Facility is to be shut down or slowed down while new rules, regulations and standards are studied and adopted by the EPA, it will be by order of an appellate court and not by order of this court.

These are the reasons I have granted defendants' motion for summary judgment. This leaves unresolved plaintiffs' lawyers claim for attorneys fees to be awarded against the government. The statute [33 U.S.C. § 1365 (d)] permits the award of "costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such an award is appropriate." Plaintiffs' lawyers say that this permits an award of attorneys fees against the government even when the government prevails. This goes somewhat against my training and experience as a lawyer possessed of much experience in losing contingent fee cases. However, even if plaintiffs' lawyers are correct in their position that the government should pay losing

counsel, I do not deem it appropriate that they be subsidized with taxpayers' money in this case, and I deem it inappropriate to award them attorneys fees. Accordingly, the request for an award of attorneys fees is denied, and summary judgment shall enter against plaintiffs and in favor of the defendants.

Dated at Denver, Colorado, this 15th day of February, 1974.

/s/ Fred M. Winner
United States District Judge

APPENDIX D

FEDERAL ENERGY ADMINISTRATION
Washington, D.C. 20461

[SEAL] Office of the Administrator

March 10, 1975

Honorable Robert H. Bork
Solicitor General
Department of Justice
Constitution Avenue & 10th Street, N.W.
Washington, D.C. 20530

Dear Mr. Bork:

The Federal Energy Administration was established by Public Law 93-275 to, among other things, "advise the President and the Congress with respect to the establishment of a comprehensive National energy policy . . ." It is appropriate in light of this advisory role of FEA that I bring to your attention the substantial adverse impact on the Nation's energy program that a recent decision of the U.S. Court of Appeals for the Tenth Circuit, *Colorado Public Interest Research Group* v. *Train* (No. 74-1154), could have, and respectfully request that you seek Supreme Court review of the decision if you believe there is a legal basis for doing so.

In the decision the Court held (reversing a lower U.S. District Court) that the Environmental Protection Agency (EPA) Administrator has a duty under the

Federal Water Pollution Control Act (FWPCA) to regulate liquid discharges of source, byproduct, and special nuclear materials from nuclear plants, including licensed nuclear power plants. The Court dismissed the argument by the Government that under the Atomic Energy Act only the Atomic Energy Commission (AEC), now the Nuclear Regulatory Commission (NRC), has authority over such discharges.

The decision could affect 116 nuclear plants throughout the country that have been licensed by NRC to operate or be constructed, as well as 74 other plants for which construction permit applications are pending before NRC. Nuclear power plays a vital role in the Nation's energy program, and a high priority has been placed on efforts to expedite and coordinate the Federal and State regulatory processes for the siting, construction, and operation of nuclear power plants. The cited decision will, at a minimum, result in the EPA and the NRC having dual regulatory authority over liquid discharges of source, byproduct, and special nuclear materials from nuclear plants. Proper allocation of responsibilities between NRC and EPA with respect to control over discharges of radioactive materials was the subject of careful consideration within the highest levels of the Administration in late 1973. AEC pointed out at that time that control over radioactive discharges from nuclear plants was intimately related to control over matters of plant design, that only AEC had comprehensive

legal authority over nuclear plant design matters, that in vesting EPA with certain general standard setting authority under Reorganization Plan No. 3 of 1970 there had been no intention to vest EPA with technical competence regarding complex matters of nuclear plant design, and that EPA regulation of discharges of radioactive materials would be contrary to sound public policy that needless and wasteful duplication of effort should be avoided. After careful consideration the decision was made (Memorandum from OMB Director Ash on behalf of the President, dated December 7, 1973) that only AEC should control discharges of radioactive materials. The Court of Appeals decision will have the effect of frustrating the policy considerations that went into this decision. Moreover, there is at least the possibility that the decision might also be construed to vest each of the individual States with authority over such discharges and, in effect, to undermine the decision in *Northern States Power* v. *Minnesota*, 447 F.2d 1143 (8th Cir. 1971), aff'd., 405 U.S. 1034 (1972). It is particularly important that the nuclear power industry be subject to comprehensive requirements by a single regulatory body to insure the development of a safe and reliable system of nuclear power generation.

In summary, the Court of Appeals' decision could result in conflicting regulation of nuclear power plants by two different Federal agencies and, depending upon interpretation, by as many as fifty different

State regulatory agencies as well. We are fearful that such a crazy-quilt pattern of conflicting regulation will adversely impact upon any expansion of the role of nuclear power in meeting the Nation's energy needs, and thereby serve to frustrate the President's stated goal of having 200 major nuclear power plants within the next ten years.

Sincerely,

FRANK G. ZARB
FRANK G. ZARB
Administrator

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